

MARKWINS

Print: Sep 8, 2006

75832335

DESIGN MARK

Serial Number

75832335

Status

REGISTERED

Word Mark

T-U-P BIOSYSTEMS

Standard Character Mark

No

Registration Number

2682141

Date Registered

2003/02/04

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

T-UP Biosystems, Inc. CORPORATION NEW YORK 458 Neptune Ave, Suite 11F
Brooklyn NEW YORK 112244325

Goods/Services

Class Status -- ACTIVE. IC 005. US 006 018 044 046 051 052. G & S:
nutraceuticals, namely dietary supplements, vitamin and mineral
supplements, herbal and plant derived products, namely, dietetic food
supplements in the form of capsules, tablets, lozenges, sprays, drops,
extract powders, teas and tea bags; dietetic substances for
improvement of health, namely food for medically restricted diets;
dietary nutritional supplement drink mixes in liquid or powdered form
for use as a meal replacement; herbal supplements; herbal food
supplements; herbal teas for medicinal purposes; herbs for medicinal
purposes; medical herbal tonics for improvement of health; medicated
herbal and plant derived hygiene products for personal use, namely,
disposable liquid douche, vaginal anti-itch ointment and
suppositories; nutritional supplements made from roots for improvement
of general health for internal and external use; roots for medicinal
purposes; vitamin and mineral food supplements; mineral supplements
and vitamin supplements in the form of a chewing gum; medicated herbal
and nutritional transdermal beauty care supplement preparations,

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namely, skin, hair, nails, sunburn, facial, body sprays, body lotions and creams; medicated hair shampoos, hair conditioners, hair gels, hair mousse, skin toners, lip balm, lip ointment, lip gloss, and facial tissues; medicated adhesive tape; medicated hand and body soaps and deodorants made with natural herbal and plant preparations; natural herbal products, namely aroma therapy packs containing herbs used for aroma therapy; nutritional supplements for protection against aging; medicated serums, lotions and balms for anti-aging of skin for internal and external use; nutritional food additives; nutritional food additives for hair, nail and skin care; medicated transdermal creams, lotions, ointments, serums, balms; antioxidant balms in serum and vitamins form; medicated lipid balms in serum form made with nutritional supplements; topical gel for anti-itching and bug-bites; medicated medicinal oils external use; medicinal nutritional oils and gels for external use to deliver vitamins, hormones, minerals, herbs, plants, or other nutritional supplements; all purpose disinfectants; antiseptics made with herbal and plant derived ingredients. First Use: 1998/04/08. First Use In Commerce: 1999/04/28.

Disclaimer Statement

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "BOIOSYSTEMS" APART FROM THE MARK AS SHOWN.

Filing Date

1999/10/27

Examining Attorney

DEFORD, JEFF

T-U-P BIOSYSTEMS

Print: Sep 8, 2006

78059482

DESIGN MARK

Serial Number

78059482

Status

REGISTERED

Word Mark

TRUEFAUX

Standard Character Mark

No

Registration Number

2796006

Date Registered

2003/12/16

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

TRUEFAUX, L.L.C. LTD LIAB CO TEXAS 5402 MILLER AVENUE DALLAS TEXAS 75206

Goods/Services

Class Status -- ACTIVE. IC 003. US 001 004 006 050 051 052. G & S: BATH SALTS, BODY MOUSSE, BODY LOTION, NON-MEDICATED LIP BALM AND LIP OINTMENT, SCENTED BATH SOAP FOR SKIN, SCENTED BODY OIL. First Use: 2001/03/00. First Use In Commerce: 2001/03/00.

Filing Date

2001/04/20

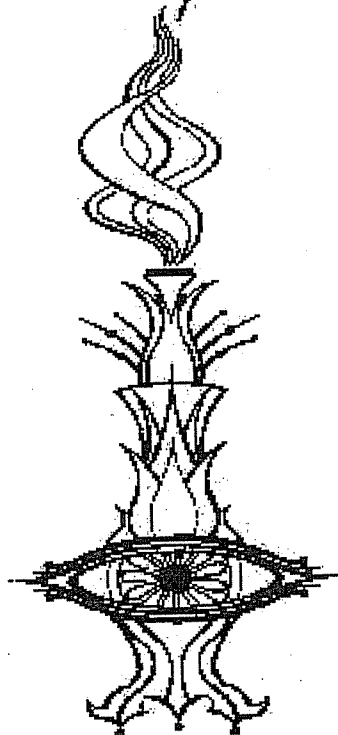
Examining Attorney

BROWN, BARBARA

Attorney of Record

Kristy Bullard Mothersbaugh

Arufaux



Print: Sep 8, 2006

78233453

TYPED DRAWING

Serial Number

78233453

Status

REGISTERED

Word Mark

BLISTEX

Standard Character Mark

No

Registration Number

2817472

Date Registered

2004/02/24

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

Blistex Bracken Limited Partnership LIMITED PARTNERSHIP WASHINGTON
1325 - 4th Avenue, Suite 1402 Seattle WASHINGTON 98101

Goods/Services

Class Status -- ACTIVE. IC 003. US 001 004 006 050 051 052. G & S:
Lip and skin care products namely-- lip balm; non-medicated lip
ointment for the prevention and treatment of blistered, chapped,
sunburned and irritated lips, cold sores, and fever blisters; and, sun
screen. First Use: 1939/07/01. First Use In Commerce: 1939/07/01.

Goods/Services

Class Status -- ACTIVE. IC 005. US 006 018 044 046 051 052. G & S:
medicated preparations for treating and preventing blistered, chapped,
and irritated skin and lips, cold sores, fever blisters, mouth
irritations, and sunburn. First Use: 1939/07/01. First Use In
Commerce: 1939/07/01.

Prior Registration(s)

0804558;1897266;AND OTHERS

Filing Date

Print: Sep 8, 2006


78233453


2003/04/03


Examining Attorney
SNYDER, NELSON


Attorney of Record
James R. Uhler

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The American Heritage® Dictionary of the English Language. Fourth Edition. 2000.

lip

PRONUNCIATION:  lip

- NOUN:**
1. *Anatomy* Either of two fleshy folds that surround the opening of the mouth.
 2. A structure or part that encircles or bounds an orifice, as: *a. Anatomy* A labium. *b.* The margin of flesh around a wound. *c.* Either of the margins of the aperture of a gastropod shell. *d.* A rim, as of a vessel, bell, or crater.
 3. *Botany* One of the two divisions of a bilabiate corolla or calyx, as in the snapdragon, or the modified upper petal of an orchid flower.
 4. The tip of a


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snapdragon, or the modified upper petal of an orchid flower. 4. The tip of a pouring spout, as on a pitcher. 5. *Slang* Insolent talk.

TRANSITIVE Inflected forms: **lipped, lip-ping, lips**

VERB: 1a. To touch the lips to. b. To kiss. 2. To utter. 3. To lap or splash against. 4. *Sports* To hit a golf ball so that it touches the edge of (the hole) without dropping in.

ETYMOLOGY: Middle English, from Old English *lippa*. See *leb-* in Appendix I.

OTHER FORMS: **lip'less** — ADJECTIVE

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To: Einstein Cosmetics Ltd (kcunningham@cislo.com)

Subject: TRADEMARK APPLICATION NO. 78903602 - EINSTEIN LIP THERAPY - EC 1003

Sent: 3/19/2007 12:03:10 PM

Sent As: ECOM107@USPTO.GOV

Attachments: Attachment - 1
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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/903602

APPLICANT: Einstein Cosmetics Ltd

CORRESPONDENT ADDRESS:

Kelly W. Cunningham
Cislo & Thomas LLP
233 Wilshire Blvd., Suite 900
Santa Monica CA 90401

78903602

RETURN ADDRESS:

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: EINSTEIN LIP THERAPY

CORRESPONDENT'S REFERENCE/DOCKET NO: EC 1003

CORRESPONDENT EMAIL ADDRESS:
kcunningham@cislo.com

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

RESPONSE TIME LIMIT: TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

MAILING/E-MAILING DATE INFORMATION: If the mailing or e-mailing date of this Office action does not appear above, this information can be obtained by visiting the USPTO website at <http://tarr.uspto.gov/>, inserting the application serial number, and viewing the prosecution history for the mailing date of the most recently issued Office communication.

Serial Number 78/903602

THIS IS A FINAL ACTION

This letter responds to applicant's communication filed on March 13, 2007. Applicant's disclaimer statement was received and made of record. Applicant's amendment to allege use was received and made of record. Upon review, the following refusal is continued and made final.

Likelihood of Confusion

Registration was refused under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because the mark for which registration is sought so resembles the marks shown in U.S. Registration Nos. 1318877 and 1496509 as to be likely, when used in connection the identified goods, to cause confusion, or to cause mistake, or to deceive.

The examining attorney has considered the applicant's arguments carefully but has found them unpersuasive. For the reasons below, the refusal under Section 2(d) is maintained and made FINAL.

EINSTEIN LIP THERAPY vs. Registration Nos. 1318877 and 1496509, LIP THERAPY

Section 2(d) of the Trademark Act bars registration where a mark so resembles a registered mark, that it is likely, when applied to the goods, to cause confusion, or to cause mistake or to deceive. TMEP section 1207.01. The Court in *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), listed the principal factors to consider in determining whether there is a likelihood of confusion. Among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression and the similarity of the goods. The overriding concern is to prevent buyer confusion as to the source of the goods. *Miss Universe, Inc. v. Miss Teen U.S.A., Inc.*, 209 USPQ 698 (N.D.

Ga. 1980). Therefore, any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant. *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368 (CCPA 1974).

The examining attorney must look at the marks in their entireties under Section 2(d). The mere addition of a term to a registered mark is not sufficient to overcome a likelihood of confusion under Section 2(d). *Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) ("BENGAL" and "BENGAL LANCER"); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) ("THE LILLY" and "LILLI ANN"); *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988) ("MACHO" and "MACHO COMBOS"); *In re United States Shoe Corp.*, 229 USPQ 707 (TTAB 1985) ("CAREER IMAGE" and "CREST CAREER IMAGES"); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) ("CONFIRM" and "CONFIRMCELLS"); *In re Riddle*, 225 USPQ 630 (TTAB 1985) ("ACCUTUNE" and "RICHARD PETTY'S ACCU TUNE"); *In re Cosvetic Laboratories, Inc.*, 202 USPQ 842 (TTAB 1979) ("HEAD START" and "HEAD START COSVETIC"). The applicant's mark has incorporated the term "LIP THERAPY" which is the registrant's mark. When the applicant's mark is compared to a registered mark, "the points of similarity are of greater importance than the points of difference." *Esso Standard Oil Co. v. Sun Oil Co.*, 229 F.2d 37, 108 USPQ 161 (D.C. Cir.), *cert. denied*, 351 U.S. 973, 109 USPQ 517 (1956).

Although both applicant and registrant have disclaimed the word, LIP, from their respective marks, the marks must be considered in their entireties when determining whether there is likelihood of confusion. A disclaimer does not remove the disclaimed portion from the mark for the purposes of this analysis. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214 (TTAB 2001); *In re MCI Communications Corp.*, 21 USPQ2d 1534 (Comm'r Pats. 1991). Purchasers are not aware of disclaimers that reside only in the records of the U.S. Patent and Trademark Office.

Accordingly, the marks are essentially the same in sound, appearance, and meaning. Consequently, the respective marks have very similar commercial impressions.

Furthermore, applicant's goods "lip balm; lip cream" are identical and highly related to registrant's goods, "non-medicated lip balm" and "medicated lip ointment." The fact that the United States Patent and Trademark Office classifies goods or services in different classes does not establish that the goods and services are unrelated under Trademark Act Section 2(d), 15 U.S.C. §1052(d). The determination concerning the proper classification of goods or services is a purely administrative determination unrelated to the determination of likelihood of confusion. *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771 (Fed. Cir. 1993); *National Football League v. Jasper Alliance Corp.*, 16 USPQ2d 1212, 1216 n.5 (TTAB 1990); TMEP §1207.01(d)(v).

Attached are eleven copies of printouts from the USPTO X-Search database, which show third-party registrations of marks used in connection with the same or similar goods as those of applicant and registrant in this case. These printouts have probative value to the extent that they serve to suggest that the goods listed therein, namely lip balms, lip creams, and lip ointments, are of a kind that may emanate from a single source. See *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-1218 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988).

The examining attorney must determine whether there is a likelihood of confusion on the basis of the goods identified in the application and registration. If the cited registration describes the goods broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, it is presumed that the registration encompasses all goods of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re*

Elbaum, 211 USPQ 639 (TTAB 1981). Registrant's "lip ointment" could include applicant's goods.

The examining attorney underscores that the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983).

For the reasons discussed above, consumers are likely to confuse the source of the applicant's goods with the source of the registrant's goods, upon encountering them in the marketplace.

Options

If applicant fails to respond to this final action within six months of the mailing date, the application will be abandoned. 15 U.S.C. §1062(b); 37 C.F.R. §2.65(a). Applicant may respond to this final action by:

- (1) submitting a response that fully satisfies all outstanding requirements, if feasible (37 C.F.R. §2.64(a)); and/or
- (2) filing an appeal to the Trademark Trial and Appeal Board, with an appeal fee of \$100 per class (37 C.F.R. §§2.6(a)(18) and 2.64(a); TMEP §§715.01 and 1501 *et seq.*; TBMP Chapter 1200).

In certain circumstances, a petition to the Director may be filed to review a final action that is limited to procedural issues, pursuant to 37 C.F.R. §2.63(b)(2). 37 C.F.R. §2.64(a). See 37 C.F.R. §2.146(b), TMEP §1704, and TBMP Chapter 1201.05 for an explanation of petitionable matters. The petition fee is \$100. 37 C.F.R. §2.6(a)(15).

/Steven Jackson/

Steven W. Jackson

Trademark Attorney

Law Office 107

Phone: 571-272-9409

Fax: 571-273-9107

HOW TO RESPOND TO THIS OFFICE ACTION:

- **ONLINE RESPONSE:** You may respond using the Office's Trademark Electronic Application System (TEAS) Response to Office action form available on our website at <http://www.uspto.gov/teas/index.html>. If the Office action issued via e-mail, you must wait 72 hours after receipt of the Office action to respond via TEAS. **NOTE: Do not respond by e-mail. THE USPTO WILL NOT ACCEPT AN E-MAILED RESPONSE.**
- **REGULAR MAIL RESPONSE:** To respond by regular mail, your response should be sent to the mailing return address above, and include the serial number, law office number, and examining attorney's name. **NOTE: The filing date of the response will be the date of receipt in the Office,** not the postmarked date. To ensure your response is timely, use a certificate of mailing. 37 C.F.R. §2.197.

STATUS OF APPLICATION: To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov>.

VIEW APPLICATION DOCUMENTS ONLINE: Documents in the electronic file for pending applications can be viewed and downloaded online at <http://portal.uspto.gov/external/portal/tow>.

GENERAL TRADEMARK INFORMATION: For general information about trademarks, please visit the Office's website at <http://www.uspto.gov/main/trademarks.htm>.

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY SPECIFIED ABOVE.